

In the United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

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GEORGE HENRY CLEVELAND,	}	No. 11276
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		
ALEX L. PENOR,	}	No. 11274
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		
WILLIS BERYL SMITH,	}	No. 11275
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

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**COMBINED APPELLANTS' BRIEF**

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Upon Appeal from the District Court of the United States  
for the District of Oregon.

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**JURISDICTION**

This Court has jurisdiction of these appeals pursuant to Title 28, Section 723(A), U. S. Code and the rules of the Supreme Court promulgated May 7, 1934.

## STATEMENT OF CASES

### Generally

These are criminal actions instituted in the United States District Court for the District of Oregon, by the return of indictments charging defendants with violation of the Selective Service and Training Act of 1940 as amended, and the regulations there under.

The defendants are all members of the sect known as Jehovah's Witnesses. In order that the Court may understand some of the beliefs and history of Jehovah's Witnesses, the following excerpts are taken from an article on page 77, of the Reader's Digest for January, 1947:

"The Jehovah's Witnesses' record of persecution for religious beliefs was unequaled during the war. Because they refused to perform any of the normal duties of citizenship, such as voting and jury duty, or to salute the flag, they were accused of being pro-Axis in the Allied countries, and pro-Ally in the Axis countries. In Germany they were among the first to be thrown into Hitler's concentration camps. In Canada the organization was outlawed completely. In England some of its leaders were thrown into jail.

"In the United States, shamefully enough, it was no better. Hundreds of Witnesses attempting to preach their Gospel were dosed liberally with castor oil, Mussolini-fashion, beaten, shot, tarred and feathered. Their literature and meeting places were burned; their children expelled from public schools. Approximately 4000 of

them were sent to prison for claiming that they were ministers of the Gospel and not subject to selective service.

“Instead of being wiped out, the Witnesses thrived on this persecution. The 1940 American membership was estimated at 44,000 and the world membership at well under a million. Today the figures are something like 500,000 in the United States and nearly three million all over the world.

“The name of the society comes from the 43rd Chapter of Isaiah which says, ‘Ye are my witnesses, saith Jehovah, and my servant whom I have chosen.’ Their doctrines are simple, being basically a down-to-earth fundamentalism that follows only what is written in the Bible. For this reason they are against all organized religion, since they can find no justification for a church or a hierarchy of any kind in the Bible.

“The Witnesses prophesy that on some day before 1984 Gabriel’s trumpet will blow and Christ’s voice will announce that the end is at hand. God’s hosts will descend from the heavens to fight the Battle of Armageddon and the ‘Great Theocracy’ will be established on earth. The only human beings left will be Jehovah’s Witnesses. They believe, therefore, that their mission is to bring as many as possible into the fold, and they devote endless hours every week, following Christ’s method of personal invitation. They do it by ringing doorbells, playing their religious phonograph records, and handing out tracts both to householders and on street corners. . . .

“Jehovah’s Witnesses have no churches. Their local

societies are called 'company organizations' and their meeting places, whether an elaborate ex-hospital as in Little Rock, Ark., or a grass hut in the Mysore jungle, are called 'kingdom halls.' On Sunday nights they gather to discuss a Bible lesson, handed down to them by the Brooklyn headquarters. In the daytime the 'publishers,' as they are called, go from house to house 'witnessing' or 'exchanging for a contribution' the pamphlets and books which they have bought from the society. The ideal work week for 'publishers' according to the society is 'five days devoted to God, and one day to secular work.' . . .

"After Rutherford's death in 1942 Nathan Homer Knorr was elected to fill his place. But the Great Personality is a fairly recent convert, Hayden C. Covington, formerly a lawyer in San Antonio and now the society's legal counsel.

"Covington—drawling, handsome, wisecracking—has been described as one of the country's most resourceful attorneys. From 1941 to 1946 he personally handled 4200 Jehovah's Witness cases in the state and federal courts, 35 of them before the U. S. Supreme Court itself. Covington argues all the Supreme Court cases personally and has won notable victories.

"In 1942, for instance, three West Virginians were threatened with prosecution if they did not force their children to salute the flag in school. The Supreme Court upheld Covington, and it is now illegal for any school board to force children to do anything against their religious principles. Another Supreme Court decision,

fought through Covington, established the ruling that distributing tracts is as much a part of the freedom of religion as going to church.

“These momentous decisions probably will be remembered long after Jehovah’s Witnesses become extinct. As Roger Baldwin, head of the American Civil Liberties Union, put it, ‘by contesting in the courts every restriction of them, these Jehovah’s Witnesses have won for you and me a degree of freedom we’ve never had before. In serving what they conceive to be the cause of God, they have served the cause of their fellow men.’ ”

### **Specifically**

A. United States vs. George Henry Cleveland. The defendant was indicted on October 17, 1945, charged with deserting Civilian Public Service Camp number 128, LaPine, Oregon, on June 24, 1945. He admitted leaving the camp, but contended at the trial that he was exempt from training and service under the Selective Service and Training Act for the reason that he was a minister of religion, and as such entitled to the classification of 4D, which was denied him by his local board. At the trial, the Court permitted evidence as to defendants claim for exemption to go into evidence, but in the instructions, withdrew the consideration of defendants’ classification from the jury. (Tr. p. 24).

B. United States vs. Alex Penor. The defendant was indicted on June 14, 1945, charged with deserting from Civilian Public Service Camp number 128, LaPine, Ore-

gon, on June 11, 1945. The defendant contended at the trial that he was a minister of religion and as such exempt from training and service under the Selective Service and Training Act of 1940, but the Court, over the objections of the defendant, withdrew the considerations of defendants' classifications from the jury. (Tr. p. 45, 46). The jury thereupon brought in a verdict of guilty, and defendant subsequently appealed.

C. *United States vs. Willis Beryl Smith*. This defendant was indicted on October 17, 1945, charged with failing to report for induction. He admitted his failure to report for induction at the trial and contended that he was exempt from training and service under the Act, by reason of being a minister of religion and entitled to the classification of 4D. He also contended that he was deprived of his right of appeal by the local draft board in that the local draft board reclassified defendant from 4F to 1A against his will and after he had filed notice of appeal which they disregarded, and wrongfully denied. The Court withdrew from the consideration of the jury the question of defendants classification and also withdrew from the jury the consideration of the fact that defendant had been deprived of his right of appeal by the local board.

## QUESTIONS INVOLVED

### I.

Have the defendants, after having reported to Civilian Public Service Camps, or after having been ordered to report for induction, as ordered by their local draft

boards, exhausted all administrative remedies so as to qualify them to urge in defense to an indictment charging desertion from a Civilian Public Service Camp, or for failing to report for induction, that the order to report upon which the indictment was based is void because they are ministers of religion and therefore exempt from all duty of training and service under the Selective Service and Training Act of 1940?

## II.

If the defendants have exhausted all administrative processes, are they entitled to prove at a trial upon an indictment for desertion from a public service camp, or for failure to report for induction, that the order requiring them to report at camp is void for any of the following reasons:

1. That the order was issued in excess of the authority of the local board;
2. That said order was beyond the jurisdiction of the local board;
3. That the order so issued was contrary to law;
4. That said order was without support of substantial evidence;
5. That said order was contrary to the undisputed evidence;
6. That War Board acted arbitrarily and capriciously;
7. That said board acted contrary to the Constitution by depriving defendants of rights and liberty with-

out due process of law;

8. That said order was issued in violation of the Regulations of the Selective Service.

### III.

Was it error for the trial courts to instruct the jury that the question of whether or not the local draft boards acted unfairly, capriciously or erroneously was not before them for consideration, and that the only question before the jury was whether the defendant had been classified in 4E and whether or not he left the Civilian Public Service Camp without proper authority?

### IV.

Under the Selective Service and Training Act of 1940 does the local board or the appeal boards have authority to classify a registrant in classification 4E (Conscientious Objector) unless registrant claims that classification? Did not the said boards act in excess of their jurisdiction when they continued appellants in the 4E classification after appellants informed said boards that they were not conscientious objectors?

## **SPECIFICATION OF ERRORS TO BE RELIED UPON**

In all three cases, defendants relied upon the point shown in the transcripts that the trial Court withdrew from the consideration of the jury, the question of whether or not appellants were entitled to a 4D classification, and thereby deprived appellants of their only

defense to the indictment.

In the Smith appeal the additional point is relied upon which is the fact as shown by the evidence and exhibits, that this defendant was denied due process by his local board in that they deprived him of his right of appeal to the appeal board as provided by the Selective Service and Training Act of 1940.

### ARGUMENT

The civil administration of the Selective Service Act, terminates when a selectee who has been found to be a conscientious objector and placed in classification 4E, arrives at the camp to which he has been ordered by his local board. He is then entitled to a judicial review of his classification as a defense to indictment. When he is denied this defense, his trial becomes a mere sham, in which all defense is taken away from him. In such a trial, the consideration of the jury is limited to a fact admitted by the defendant that is: That he left camp without permission, so that the jury's decision is merely based upon defendant's admission and he is thereby deprived of his only defense, that is, that the order requiring him to report at camp and the regulations requiring him to remain at camp are void by reason of being based upon an improper classification which denied him his exemption as provided by the Selective Service and Training Act. Such a trial comes within the prohibition of the United States Constitution, because it becomes a Bill of Attainder and denies the defendant due process of law. Since the Falbo and Billings against Truesdell,

the Supreme Court has clarified its stand in the following cases:

*Dodez vs. United States*, ..... U. S. .... No. 86  
October Term, 1946, decided December 23,  
1946.

*Estep vs. United States*, 327 U. S. 114.

*Gibson vs. United States*, ..... U. S. .... No. 23,  
Oct. Term, 1946, decided December 23, 1946.

*Smith vs. United States*, 148 Fed. (2d) 288, 327  
U. S. 114.

Another fact for the Court to consider is that the selectees sent to Civilian Public Service Camps are under the law found to be conscientiously opposed to service in the armed forces, and in accordance with the statute, ordered to work of public national importance under Civilian direction, which meant that he was assigned to a Civilian Public Service Camp. All such camps, by order of the President, were placed under the jurisdiction of General Lewis B. Hersey, and although appropriations had been made therefore, and in spite of the law which provided that the inmates of Civilian Public Service Camps should receive pay and allowances at rates not in excess of those paid to persons inducted into the army, these boys were compelled under military direction of General Hersey and other army officers under him, to labor eight hours per day and six days per week without compensation whatsoever.

Congress no doubt placed the limitations upon the pay that they should receive for the reason that it realized the possibility of conscientious objectors receiving pay in excess of those serving in the armed forces, and

desired to thus limit the pay of conscientious objectors. The law does not provide for Civilian Public Service Camps which were created by regulations of General Hersey. Congress also provided in Sec. 301(B):

“The Congress further declared that in free society the obligation and privilege of military training should be shared generally in accordance with a fair and just system of Selective Compulsory Military Training and Service.”

Congress did not intend to discriminate against any person by reason of his religious training and belief. That discrimination was practiced only by the administration of the Act under the Selective Service System, and it is respectfully contended that the administration of the Act constituted a Bill of Attainder, prohibited by the Constitution.

“Among the Constitutional guarantees against abuse of Federal power thrown around the American citizen, are these three: 1. He cannot be punished until judicially tried.” . . . *Cummings vs. Missouri*, 4 Wall 277, 286, 18 Law Ed. 356.

It is respectfully urged that selectees in a public Service Camp, by the administration requiring them to labor 48 hours per week without compensation, administered punishment for the religious belief, by restraining them of their liberties, and separating them from their families as effectively as if they had been sentenced to a penal institution by judgment of the Court.

“It is not necessary that the persons to be effected by a Bill of Attainder be named in the Bill of Attainder in the 28th year of Henry VIII, against

the Earl of Kildare and others. He enacted that: 'All such persons which be or heretofore have been comfortors, abettors, partakers, confederates or adherents under said late Earl in his traitorous acts and purposes, shall and likewise stand and be attained, adjudged and convicted of high treason.' The Constitutional prohibition was intended to protect every man's right against that kind of legislation, which seeks either to inflict a penalty without trial or to subject a new penalty on old matter." *Cummings vs. Missouri*, 4 Wall, 277, 286 18 Law Ed. 356/

## CONCLUSION

That the judgments of the Court below should be revised, and the trial Court ordered to dismiss the indictments, or in the alternative, new trials should be ordered.

Respectfully,

DELLMORE LESSARD,  
Attorney for Defendants.